

House Bills 5186, 5187, 5188

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Testimony to the House Judiciary Committee

I stand before you today as a representative from the Elder Law and Disability Rights Section council of the State Bar of Michigan, of which I was formerly the chair and as a Special Advisor to the Governor's Task Force on Elder Abuse. I have to give some caveats to start with. The Elder Law and Disability Rights Section council supported 5187 and 5188, but thought 5186 needed more work and the tie-bar should be removed unless this work is done. Personally, I think the substitute version before you today addresses the original problems, but the council has not had an opportunity to review it. The State Bar as a whole has not taken a position on these bills and might not. There are strong constitutional restrictions on the State Bar political activity, restrictions that do not apply to voluntary associations, such as Bar sections. The section council asked me to talk with you, but has not had an opportunity to review my text, so I am solely to blame for any misstatements or misanalyses.

With that out of the way, let me begin. Why do we need these bills? The basic answer is that there have been abuses by court-appointed guardians and conservators and these bills provide relatively inexpensive and easy ways to address many of these, ways that do not cause great complications elsewhere.

5187 closes a loophole in the current law. A conservator cannot sell a protected person's real property now without court approval. There is no law now that would prevent a conservator from doing virtually the same thing by sucking all or most of the equity out of the property. For example, if a conservator obtained a 100% mortgage on property and took the cash in exchange, that action is virtually equivalent in terms of financial risk to selling the property. In either case, a conservator could make a sweetheart deal with a friend that does not reflect the true value of the property. In either case, the conservator could be left a pile of cash that could be mismanaged or exploited. 5187 would require the same sort of court approval for using property as collateral as for selling it.

5188 makes it clear that bonds are normally required where there are significant liquid assets in the conservatorship account. Liquid assets, such as cash, present the greatest risk of mischief because they can disappear so quickly and are difficult to trace. There are situations of little risk where bonding is not required and the court is given proper discretion in other special situations according to the terms of the bill. 5188 does not directly prevent exploitation, but helps in other ways: (1) If there is exploitation, the bond can be used to restore the value that was wrongfully taken. (2) The fact that the bonding company is likely to be pretty aggressive in seeking indemnification from a wrongdoer ought to discourage such wrongful acts. (3) Persons with a previous history of financial shenanigans would find it difficult to obtain bonding. 5188 would also be helpful in preventing

situations where professional conservators who are well known have been excused from posting bond. The most flagrant cases of exploitation involve such professionals who were excused from bonding requirements.

5186 adds an extra bit of protection. Most petitions are filed by relatively unsophisticated persons. Such persons may not understand the differences between guardianships and conservatorships and might not recognize that the subject of the petition has significant financial resources at risk. 5186 would require a guardian ad litem who investigates matters after a guardianship petition is filed to ask a few questions about potential financial resources and report the results to the court. The guardian ad litem could recommend that a conservatorship is needed or give the facts to the courts without an explicit recommendation. This should help in alerting the court to potential financial risks faced by persons lacking capacity to manage their affairs and provide protection before significant loss occurs.

In summary, each of these bills adds an extra bit of protection that is not available currently. Protected persons with guardians and conservators are probably the most vulnerable people in our state. When our courts hand over control of their assets to someone else, we have a responsibility to make sure that these court-appointed fiduciaries are doing a good job. The bills help in giving us extra assurance that they are are. I urge you to support them.

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